

Commonwealth Of Kentucky

Court Of Appeals

No. 1999-CA-002743-WC

J. MILTON'S STEAK BUFFET

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-97-63366

WILLIAM POSEY;
HON. J. LANDON OVERFIELD,
Administrative Law Judge; and
WORKERS COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, JOHNSON, and TACKETT, Judges.

BUCKINGHAM, JUDGE. J. Milton's Steak Buffett petitions for our review of an opinion of the Workers' Compensation Board (Board) which affirmed an opinion by an administrative law judge (ALJ) awarding benefits to William Posey based on a finding of total

occupational disability. Having considered the record and Milton's arguments,¹ we affirm.

While working for Brownies Creek Collieries in 1982, Posey suffered a low back injury. His claim was settled for \$13,026.83 for 20% permanent partial disability. On October 11, 1997, while working as a dishwasher at Milton's, Posey again injured his low back. On November 26, 1997, Dr. James R. Bean performed lumbar disk surgery at the L-4/5 level. The ALJ determined that Posey was totally occupationally disabled and awarded benefits. After Milton's appeal of the ALJ's ruling to the Board was rejected, this petition for review followed.

Milton's first argument is that the ALJ and the Board erred by not reducing the award by the income benefits Posey received in the settlement of his first claim. KRS 342.730(2) provides that

[t]he period of income benefits payable under this section on account of any injury shall be reduced by the period of income benefits paid or payable under this chapter on account of a prior injury if income benefits in both cases are for disability of the same member or function, or different parts of the same member or function, and the income benefits payable on account of the subsequent disability in whole or in part would duplicate the income benefits payable on account of the pre-existing disability.

In rejecting Milton's argument, the ALJ held as follows:

4. Defendant Employer also argues that, pursuant to KRS 342.730(2) it is entitled to a credit for the amounts paid in

¹ Posey did not file a brief.

the previous settlement. KRS 342.730(2) has been determined to relate to overlapping benefits, in other words, benefits paid for the same period of time for the same body part. Plaintiff's settlement was based on a 19[82] injury and was based on payments for 425 weeks. The benefit period for the previous settlement had long expired prior to Plaintiff's October 11, 1997 injury. Therefore, Defendant Employer is entitled to no credit for Plaintiff's previous settlement.

We adopt the Board's opinion affirming the ALJ in this regard:

In this instance, the period of income benefits payable for the 1982 injury expired long before the October 1997 injury. Since there is no overlap of the periods for the two injuries, no portion of the income benefits payable on account of the subsequent disability duplicates the income benefits payable on account of the preexisting disability. Additionally, it is important to note the ALJ determined Posey's total disability was the result of the 1997 injury. His prior claim resulted in a settlement. That claim was not reopened and there has been no adjudication of the extent of the prior disability, if any. Since the ALJ determined the 1997 injury resulted in the total disability and since there was no overlap of the periods of benefits, we find no error in the ALJ's determination that Milton's is entitled to no credit for the 1982 settlement.

Milton's second argument is that the record does not support the ALJ's finding that Posey was totally occupationally disabled. Medical records from Dr. Bean indicated he anticipated Posey would have a 5% functional impairment rating. Dr. James Templin testified that he determined Posey had a 10% functional impairment rating under the DRE of the AMA Guidelines. He further testified that, using the range of motion model which he

thought was more appropriate, Posey would have a 23% functional impairment. Dr. Ballard D. Wright assigned a 20% functional impairment rating under the AMA Guidelines. The Board held that evidence from these doctors and from Posey was substantial evidence to support the ALJ's finding that Posey is totally occupationally disabled. The Board further held that evidence from the doctors and from Posey was sufficient to establish the 1997 injury as the cause of that disability.

Under Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the function of this court "is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Id. at 687-88. We perceive no error in this case and conclude that there was sufficient evidence to support the finding that Posey was totally occupationally disabled.

The Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles W. Berger
Harlan, KY

BRIEF FOR APPELLEE:

None filed